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HAROLD B. WILLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 723

L. E. (PRINCE) WALES, DOING BUSINESS AS WALES TRUCKING COMPANY, L. C. JONES TRUCKING COMPANY, INCORPORATED, PARK-HILL TRUCK COMPANY, AND H. J. JEFFRIES TRUCK LINE, *Appellants,*

vs.

THE UNITED STATES OF AMERICA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

STATEMENT OF NEWSOM TRUCK LINE, INCORPORATED, APPELLEE, AS TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

R. E. KIDWELL,
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JO E. SHAW,
Of Counsel.

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L. E. (PRINCE) WALES, DBA WALES TRUCKING COMPANY, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.

STATEMENT OF NEWSOM TRUCK LINE, INCORPORATED, APPELLEE, AS TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Appellee (Respondent in the District Court), Newsom Truck Line, Inc., respectfully submits herein its statement in opposition to Appellants' (Complainants in the District Court), jurisdictional statement and its motion to dismiss the appeal, or in the alternative, to affirm the judgment of the District Court for the reason that Appellants' jurisdictional statement does not present any substantial questions.

Questions Presented

The questions presented by Appellants which this Appellee asserts are not of a substantial nature and which have been answered unfavorably to Appellants by prior decisions of the Supreme Court of the United States, are: First, whether the order of the Interstate Commerce Com-

mission granting a certificate of public convenience and necessity to Appellee is void because the hearings before the Commission were not held by an examiner appointed as provided in the Administrative Procedure Act; Second, whether, if Appellee's application before the Interstate Commerce Commission was consolidated with certain of the related applications for hearing and disposition (which consolidation is denied by Appellee for the reason that its application was heard on a separate record and disposed of in a separate order). Appellants were thereby deprived of a full, fair and impartial hearing; Third, whether the findings and conclusions of the Interstate Commerce Commission with respect to Appellee are reasonably supported by reliable and substantial evidence as applied to the whole record; and Fourth, whether the refusal of the Interstate Commerce Commission to grant rehearing of the proceedings constituted a proper exercise of its discretion.

I

The Question Whether the Order of the Interstate Commerce Commission Granting a Certificate of Public Convenience and Necessity to Appellee Is Void Because the Hearings Before the Commission Were Not Held by an Examiner Appointed as Provided in the Administrative Procedure Act Has Been Decided Adversely to Appellants by the Supreme Court of the United States in United States of America et al. v. L. A. Tucker Truck Lines, Inc., 344 U. S. 33.

Appellants direct certain assignments of error to the refusal of the District Court to set aside the order of the Interstate Commerce Commission because the examiner who presided at the hearings on Appellee's application had not been appointed in conformity with the Administrative Procedure Act.

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The record discloses that Appellants participated in the hearings before the examiner at Houston, Texas, and Denver, Colorado, without at any time objecting to the qualifications of the examiner, and raised the question of his qualifications for the first time in their petition for reconsideration. As a matter of fact, the examiner recommended that Appellee's application be denied, and recommended the entering of an order favorable to Appellants, and in reply to the exceptions filed by the Appellee to the report and recommended order of the examiner, certain of the Appellants in their reply to such exceptions, which reply is dated September 21, 1950, urged that Appellee's exceptions be denied and that the order recommended by the examiner be sustained.

In this connection, the Supreme Court on the specific point here involved, in *United States of America, Et Al.*, vs. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, held as follows:

> "The question not being foreclosed by precedent, we hold that the defect in the examiner's appointment was an irregularity which would invalidate a resulting order if the Commission had overruled an appropriate objection made *during the hearings*. But it is not one which deprives the Commission of power or jurisdiction, so that even in the absence of timely objection its order should be set aside as a nullity." (italics ours.)

In view of the fact that Appellants sat idly by for about two years hoping that the Interstate Commerce Commission would sustain the denial recommended by the examiner, clearly constituted a waiver by Appellants of any objection to the qualifications of the hearing examiner which they might have otherwise properly asserted.

This conclusion is clearly in accord with the holding in the *Tucker Case* wherein the Court further held that fairness requires that the courts should not set aside adminis-

trative decisions unless the administrative body "*has erred against objection made at the time appropriate under its practice.*" (italics ours.)

Appellee submits that no substantial question regarding the examiner's qualifications has been presented.

II

The Question of the Consolidation of Certain of the Applications Does Not Involve Appellee Because Its Application Was Heard Separately and Disposed of in a Separate Report.

The application of Appellee, Newsom Truck Line, Inc., was heard separately and disposed of in a separate order by the Interstate Commerce Commission. In this connection the District Court in its opinion found that: "The Respondent, Newsom Truck Line application was heard separately. Testimony in the *Newsom case* was taken at Houston on May 2, 1949, and concluded at Denver on June 28, 1949." The mere fact that the separate report of Division 5 of the Commission in the *Newsom Case* bore the same date as the report dealing with the other applications which were consolidated, June 11, 1951, is certainly immaterial. In this connection, the District Court in referring to the report relating to the consolidated applications of the other eighteen applicants and the report dealing with the Newsom application had this to say: "This report was dated June 11, 1951. On the same date, the Newsom Truck Line was also granted a certificate."

It is clear that the Newson application was separately heard, treated, considered and dealt with by the Commission, and was not consolidated with the applications of the other eighteen appellees.

However, if by the most strained construction, it could be said that the Newsom application was consolidated with

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the others, the procedure followed by the Commission was in keeping with accepted practice, and Appellant's complaint with respect thereto is without merit in view of the decision by the Supreme Court in *United States, et al.* vs. *Pierce Auto Freight Lines, et al.*, 327 U. S. 515, and other decisions by the Court applying the same reasoning.

III

The Findings and Conclusions of the Interstate Commerce Commission Are Reasonably Supported by Reliable and Substantial Evidence as Applied to the Whole Record.

The question here presented by Appellants is not substantial. Extensive hearings were conducted on the application in question, both in Houston, Texas, and in Denver, Colorado. The District Court found that:

> "Voluminous testimony, covering thousands of pages, was introduced in the hearing before us, and such testimony discloses that there is ample testimony to support the findings of the Commission in overruling the recommendation of the Examiner and in granting the certificates sought. Such testimony included persons entirely familiar with the incoming oil fields in the mentioned states, with the exception of one or two of such states, and with the vast number of trucks that are required to carry heavy oil drilling and oil developing machinery. Also covering leases that had been made in these particular territories, which, of course, carry expiration dates and necessity for development without delay."

In this connection, the complaint of Appellants amounts to a request that the findings and conclusions of the Interstate Commerce Commission and of the District Court be held for naught and that the judgment of the Supreme Court be substituted therefor.

It is true that some of the evidence before the Commission concerned itself with future needs, but in *United States* vs. *Detroit and Cleveland Navigation Company*, 326 U. S. 236, 241, the Supreme Court said:

> "Forecasts as to the future are necessary to the decision. But neither uncertainties as to the future, nor the inability or failure of existing carriers to show the sufficiency of their plans to meet future traffic demands need paralyze the Commission into inaction. It may be that the public interest requires that future shipping needs be assured rather than left uncertain. The Commission has the discretion so to decide."

Appellee contends that the question here discussed is completely lacking in substance.

IV

The Refusal of the Interstate Commerce Commission to Grant Rehearing Is Clearly Within the Discretion of That Body under the Circumstances of Each Case.

Appellants' complaint that the Commission refused rehearing presents no substantial question for the reason that rehearing is not granted as a matter of right, but requests therefor are addressed to the discretion of the Commission. There is no abuse of such discretion shown where the Commission refuses rehearing merely because there is a gap in time between the date when the hearing is closed and the order of the Commission is entered. Such a gap is usually present, and necessarily so, under general administrative procedure, and in numerous decisions by the Supreme Court of the United States it has been held that only a showing of the clearest abuse of discretion would justify the setting aside of an order for refusal to grant rehearing. *United States, et al.* vs. *Pierce Auto Freight Lines, Inc., et al.*, 327 U. S. 515.

There has been no showing that the Commission abused its discretion in this regard, and Appellants' complaint lacks substance.

Conclusion

Wherefore, Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the decree entered below.

Respectfully submitted,

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JO E. SHAW,
Of Counsel.